DEPARTMENT OF STATE REVENUE

03-20130687.LOF

Letter of Findings: 03-20130687
Withholding Tax
For the Years 2010, 2011, and 2012

NOTICE: IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective as of its date of publication and remains in effect until the date it is superseded by the publication of another document in the Indiana Register.

ISSUES

I. County Withholding Tax–Imposition.

Authority: IC § 6-3-4-8; IC § 6-3-4-13; IC § 6-8.1-5-1; IC § 6-8.1-7-1; Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); I.R.C. § 3402; 45 IAC 3.1-1-97.

Taxpayer protests the assessment of county withholding tax on wages it paid to its employees for the 2010, 2011, and 2012 tax years.

II. County Withholding Tax–Statute of Limitations.

Authority: IC § 6-3-4-8; IC § 6-8.1-5-2; IC § 6-8.1-10-6; 45 IAC 3.1-1-101.

Taxpayer argues that part of the assessment for the 2010 tax year was outside of the statute of limitations.

STATEMENT OF FACTS

Taxpayer is a corporation operating an Indiana business location. The Indiana Department of Revenue ("Department") conducted an audit review of Taxpayer's business records and withholding tax returns for the 2010, 2011, and 2012 tax years. Taxpayer withheld Indiana state tax from its employees, but failed to withhold county income taxes. As a result, the Department issued proposed assessments for the county tax and interest. Taxpayer protested the assessment. An administrative hearing was conducted, and this Letter of Findings results. Additional facts will be provided as necessary.

I. County Withholding Tax–Imposition.

DISCUSSION

All tax assessments are prima facie evidence that the Department's claim for the tax is valid; the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

The Department assessed Taxpayer for county income tax that it failed to withhold from its employees' paychecks. The Department determined the amount of tax by multiplying the employees' gross wages by the appropriate county rate to arrive at the audit assessment.

Taxpayer asserts that "it is not liable for the Assessment, or is liable only for the interest portion of the Assessment." Taxpayer maintains that when it fails to withhold the tax, the Department cannot make an assessment for the tax against Taxpayer. Taxpayer states that the Department must seek the tax from the individual taxpayers and can only make assessments for penalties and interest against Taxpayer.

IC § 6-3-4-8 provides, in part, as follows:

> (a) Except as provided in subsection (d), every employer making payments of wages subject to tax under this article, regardless of the place where such payment is made, who is required under the provisions of the Internal Revenue Code to withhold, collect, and pay over income tax on wages paid by such employer to such employee, shall, at the time of payment of such wages, deduct and retain therefrom the amount prescribed in withholding instructions issued by the department. The department shall base its withholding instructions on the adjusted gross income tax rate for persons, on the total rates of any income taxes that the

taxpayer is subject to under IC 6-3.5, and on the total amount of exclusions the taxpayer is entitled to under IC 6-3-1-3.5(a)(3) and IC 6-3-1-3.5(a)(4). However, the withholding instructions on the adjusted gross income of a nonresident alien (as defined in Section 7701 of the Internal Revenue Code) are to be based on applying not more than one (1) withholding exclusion, regardless of the total number of exclusions that IC 6-3-1-3.5(a)(3) and IC 6-3-1-3.5(a)(4) permit the taxpayer to apply on the taxpayer's final return for the taxable year. Such employer making payments of any wages:

(1) shall be liable to the state of Indiana for the payment of the tax required to be deducted and withheld under this section and shall not be liable to any individual for the amount deducted from the individual's wages and paid over in compliance or intended compliance with this section; and

(2) shall make return of and payment to the department monthly of the amount of tax which under this article and IC 6-3.5 the employer is required to withhold.

(Emphasis added).

Accordingly, IC § 6-3-4-8(a) specifically requires an employer to "withhold, collect, and pay over income tax on wages paid by such employer to such employee . . . [in] the amount prescribed in withholding instructions issued by the department." IC § 6-3-4-8(a)(1) specifically provides that the employer is "liable to the state of Indiana for the payment of the tax required to be deducted and withheld." (Emphasis added). Therefore, contrary to Taxpayer's assertion that the employer's liability is limited to the amount that it actually withheld plus penalties and interest, IC § 6-3-4-8 specifically provides that the employer is liable for the amount that it was required to withhold. These statutory requirements for the employer to withhold the amount prescribed in the Department's withholding instructions and for the employer to become liable for the amount it is required to withhold are restated in 45 IAC 3.1-1-97. "Employers who make payments of wages subject to the Adjusted Gross Income Tax Act, and who are required to withhold Federal taxes pursuant to the Internal Revenue Code are required to withhold from employees' wages Adjusted Gross and County Adjusted Gross Income Tax." Id. The regulation then goes on to state, "In the case of delinquency or nonpayment of withholding tax, the employer is liable for such tax, penalties, and interest." Id.

Alternatively, Taxpayer asks for a reduction in its withholding tax liability by the actual amount that its employees paid in the employees' respective individual income tax returns attributable to the employees' given county. Taxpayer states that the Department must look beyond the W-2s and look at the individual employee's tax return information because IC 6-8.1-5-1(b) requires the Department to make its assessments based upon the "best information available" to the Department.

In effect, Taxpayer is requesting that the Department perform individual income tax audits of each of its employees to determine if the tax that it was required to pay was paid by the individuals and then relieve Taxpayer of its responsibility for withholding county income tax if individual employees did in fact report and pay the tax. For the Department to do what the Taxpayer requests, the Department would have to schedule individual audits with each of Taxpayer's employees, request copies of the employee's federal tax returns and other records, and then provide this employee's information about how much of the income was reported with the tax paid to Indiana to Taxpayer. However, there is nothing in Indiana law which allows such treatment. Moreover, if the Department attempted to do as Taxpayer suggests, the Department would be violating the tax confidentiality requirements found in IC § 6-8.1-7-1(a) that prohibits the Department from sharing one taxpayer's information–i.e., the employee's tax information–with another taxpayer–i.e., the employer. Unlike in the S-corporation withholding statute where the legislature has given the Department express authority, in IC § 6-3-4-13(i), for the shareholder's tax information to be shared with the S-corporation and to relieve the S-corporation of its withholding tax liability when the adjusted gross income tax has been paid by the shareholder, the Indiana legislature has not provided this remedy for employers with withholding tax liabilities.

Additionally, Taxpayer cites to federal regulations and procedures for the remedy that it seeks under Indiana law. However, unlike the federal withholding tax statute, in I.R.C. § 3402(d), where the United States Congress has given the IRS the express authority to share the employee's information with the employer and to relieve the employer of its withholding tax liability when the adjusted gross income tax had been paid by the employee, the Indiana legislature has not provided this remedy for employers with withholding tax liabilities. Again, under Indiana law, an employer is required to withhold the taxes as prescribed, and is liable to the state of Indiana for the amount that it was required to withhold, plus penalties and interest. IC § 6-3-4-8.

FINDING

For the reasons stated above, Taxpayer's protest is respectfully denied.

II. County Withholding Tax–Statute of Limitations.

DISCUSSION

Taxpayer argues that part of the assessment for the 2010 tax year was outside of the statute of limitations. Taxpayer asserts that, for the January 1, 2010, to August 31, 2010, tax periods, the Department is limited to the imposition of the $250 failure to file an information return penalty found in IC § 6-8.1-10-6.

IC § 6-8.1-10-6 provides:

> (a) As used in this section, "information return" means the following when a statute or rule requires the following to be filed with the department:
> (1) Schedule K-1 of form IT-20S, IT-41, or IT-65.
> (2) Any form, statement, or schedule required to be filed with the department with respect to an amount from which tax is required to be deducted and withheld under IC 6 or from which tax would be required to be deducted and withheld but for an exemption under IC 6.
> (3) Any form, statement, or schedule required to be filed with the Internal Revenue Service under 26 C.F.R. 301.6721-1(g)(1993).
> The term does not include form IT-20FIT, IT-20S, IT-20SC, IT-41, or IT-65.
> (b) If a person fails to file an information return required by the department, a penalty of ten dollars ($10) for each failure to file a timely return, not to exceed twenty-five thousand dollars ($25,000) in any one (1) calendar year, is imposed.
> (c) For purposes of this section, the filing of a substantially blank or unsigned return does not constitute a return.

However, this statute does not apply to Taxpayer's situation for two reasons. First, Taxpayer filed all of the returns in question. Thus, Taxpayer has not received an assessment based upon Taxpayer's failure to file a return. Taxpayer's assessments were based upon Taxpayer's failure to report and pay the correct amount of tax. Specifically, Taxpayer was audited and a tax deficiency was found by the Department. The Department determined that the amount that Taxpayer reported on its annual WH-3 withholding tax return underreported the amount of tax that Taxpayer was required to pay under IC § 6-3-4-8.

Second, the WH-3 return, in question, is not an "information return." Forms W-2 and Forms WH-18 withholding statements are examples of "information returns" that report information "with respect to an amount from which tax is required to be deducted and withheld." The Department requires the employer to provide an information return to a payee–i.e., the person to whom the employer is required to furnish a copy of the information set forth on an information return, but also requires the employer to file a copy of the information return that it provided to the payee with Department. The WH-3 return is the annual "reconciliation return" that the Department requires a withholding tax taxpayer to file pursuant to 45 IAC 3.1-1-101. The WH-3 return must be filed on an annual basis with the Department to report and pay the amount of withholding tax the taxpayer was required to withhold and pay to the Department under IC § 6-3-4-8 for a specific calendar year. See 45 IAC 3.1-1-101 (requiring taxpayers to file with the Department a yearly reconciliation return–i.e., Form WH-3 "Annual Withholding Reconciliation Tax Form"–to report the annual amount of tax that the taxpayer was required to pay as well as the required monthly and/or quarterly remittance returns–i.e., Form WH-1 "Indiana Withholding Tax Remittance Voucher"). The WH-3 return, as a reconciliation return, is a taxpayer's last chance to report the proper amount of withholding tax to the Department for the year and to pay and/or request a refund based upon the amount of withholding tax that the taxpayer reports as due for that year.

IC § 6-8.1-5-2(a) provides that:

> Except as otherwise provided in this section, the department may not issue a proposed assessment under section 1 of this chapter more than three (3) years after the latest of the date the return is filed, or either of the following:
> (1) The due date of the return.
> (2) In the case of a return filed for the state gross retail or use tax, the gasoline tax, the special fuel tax, the motor carrier fuel tax, the oil inspection fee, or the petroleum severance tax, the end of the calendar year which contains the taxable period for which the return is filed.

The due date for the Form WH-3 reconciliation tax return for the 2010 tax year was February 29, 2011. Therefore, the three years statute of limitations from the due date of the WH-3 return was February 29, 2014. Since the Department's assessment was made on October 15, 2013, the assessment was properly made within the statute

of limitations.

FINDING

For the reasons stated above, Taxpayer's protest is respectfully denied.

SUMMARY

Taxpayer's protest is denied, as discussed in Issue I and in Issue II.

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